No. 22,746

IN THE

# UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT



NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

GOODMAN LUMBER COMPANY, Respondent

ON PETITION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD



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## JURISDICTION

This case is before the Court on petition of the National Labor Relations Board for enforcement of its order (R. 44-49)[1] issued against respondent (hereafter "the Company") on June 29, 1967, and reported at 166 NLRB No. 48. The

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[1] The original papers in the case have been reproduced and transmitted to the Court pursuant to Rule 10(2). "R." refers to the formal documents, bound as "Volume I, Pleadings"; "Tr." refers to the stenographic transcript of testimony at the unfair labor practice hearing. References designated "GCX" and "RX" are to the General Counsel's exhibits and respondent's exhibits, respectively. Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

unfair labor practices occurred at San Francisco, California, where the Company is engaged in the business of selling lumber, hardware and plumbing supplies. The Court has jurisdiction of the proceedings under Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, *et seq.*).[2]

## STATEMENT OF THE CASE

### I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activities, by promising employee Freeman Parker, Jr. monetary benefits if he would revoke his union authorization card, and by threatening employee Freeman Parker, Sr. with reprisals if he did not convince his son to revoke his authorization card. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by discharging employee Roger Ruiz, by constructively discharging employee Parker, Jr., and by laying off employee Burwell, because of their union activities. The evidence upon which the Board based its findings is summarized below.

#### A. Background

In late October 1965,[3] employee Roger Ruiz, after discussing the possibilty of union representation with some fellow employees, contacted the Union's[3a] secretary-treasurer, George Pedrin (Tr. 26, 182-183). Ruiz himself signed

[2]The pertinent provisions of the Act are printed as Appendix A to this brief, *infra* pp. 25-26.

[3]Unless otherwise noted, all events herein occurred in 1965.

[3a]International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 12.

an authorization card on November 19, and throughout the next two weeks persuaded five other employees to sign cards also (R. 17, Tr. 184-186).[4]

On December 1, the Union informed the Company by letter that it represented a majority of the Company's "warehousemen", and requested recognition as their collective bargaining agent (R. 17; Tr. 58-59). That same day, union representative Pedrin called on the Company's general manager, Murray Gelleri, and handed him a copy of the letter requesting recognition (R. 17; Tr. 59-62). After reading the letter, Gelleri demanded proof of the Union's majority status, and Pedrin handed him the signed authorization cards (R. 17; Tr. 62). Gelleri examined them, listed the signers' names on a piece of scratch paper, and agreed to meet with Pedrin on December 10 (R. 18; Tr. 62-64, 269).[5]

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[4]Freeman Parker, Jr., Thomas H. Irving and Carbby Lee Burwell signed cards on November 19 (GCX 3, 4, 5); Joseph Pohl signed one on November 29 (GCX 7); and Julia Myers signed one on December 1 (GCX 2).

[5]The parties met on December 10, at which time the Union presented copies of a proposed contract to the Company (R. 17; Tr. 66). The Union also protested the discharge of employee Roger Ruiz, which had occurred the previous day (see discussion *infra*, pp. 5-7).

The parties met again on December 14, and the Union asked about the proposed contract (R. 17; Tr. 68). Gelleri responded, however, that he did not recognize the Union, and that the meeting was not a collective bargaining meeting (*ibid.*).

The Union subsequently filed charges against the Company, alleging that it had refused to bargain in good faith, in violation of Section 8(a)(5) and (1) of the Act; at the hearing in the instant case, the Company entered into a settlement agreement with the Union and the Board regarding the 8(a)(5) and (1) charge, under which the Company agreed to bargain with the Union, and the pertinent allegations of the Complaint were withdrawn (R. 16; Tr. 48-54).

### B. The Company interrogates its employees regarding their union activities

After the Union's demand for recognition, Gelleri, armed with his list of card signers, questioned all except one of those signers about their union membership. The very day of the demand, he separately sought out employees Freeman Parker, Jr. and Roger Ruiz, and asked each if he had signed an authorization card (R. 18-19; Tr. 147-148, 187). Receiving affirmative responses from both, he asked Parker what the Union had offered as an inducement, and Parker responded "benefits and other things" (R. 18-19; Tr. 148-149). Ruiz was asked "what sort of deal" the Union had offered (R. 19; Tr. 187). He responded "no such deal", but Gelleri pressed further, asking "what kind of pay did they promise" (*ibid.*). Ruiz answered that Gelleri "would have to discuss this in negotiations with the Union" (*ibid.*).

Parker, Jr. was also approached by President Goodman, who asked him to leave his work and "come down for a moment, he wanted to speak with [him]" (R. 19; Tr. 148-149). Parker followed Goodman out to his car, where Goodman asked if he had signed an authorization card (R. 19; Tr. 149). Parker admitted that he had, and Goodman pursued: "[Do you] plan on getting out of the Union?" (*ibid.*). Parker, Jr. said he didn't know, but Goodman warned, "Well, I think you will." (R. 19; Tr. 149).[6]

A few days after the Union's demand, Gelleri summoned employee Julia Myers to his office, and asked if the "Goodman benefits" had been explained to her (R. 17; Tr. 79). She said "Yes"; Gelleri asked her if she had signed an authorization card, and she replied that she had (*ibid.*).

On December 6, Gelleri and President Goodman summoned employee Thomas Irving into the office (R. 18; Tr. 82-83). Gelleri asked Irving if he "knew any of the benefits

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[6]The subsequent efforts to carry out this ominous warning are discussed *infra*, pp. 7-10.

of Goodman" (*ibid.*). Irving said that he did not; Goodman interjected that he "should have known about them" (R. 18; Tr. 83-84). Irving explained, however, that he had been hired for part time work by the President's son, Charles Goodman, who had not discussed the benefits (*ibid.*). Gelleri then asked Irving if he had signed an authorization card (R. 18; Tr. 83-84). When Irving admitted that he had, Gelleri launched into an explanation of the Company's benefits, and concluded by asking Irving if he had "changed [his] mind any" (*ibid.*). Irving replied, "No" (R. 18; Tr. 83-84).

Finally, Gelleri asked employee Joseph Pohl if he was familiar with the Company benefits, and whether he had signed an authorization card (R. 19; 270-271).

### C. The Company discharges Roger Ruiz

Employee Ruiz was discharged on December 9, under the following circumstances: He was hired by the Company on July 1, 1965, and worked in the "hardware warehouse" at a starting salary of $105.00 per week until the latter part of October (R. 20; Tr. 178, 193). At that time, he told President Goodman's son, Charles Goodman, that he had been offered a job with the Forestry Department, and that he thought he would take the position because it offered him a better chance of advancement than the Goodman firm (R. 21; Tr. 191, 194, 201-202). Two days later, he learned that the person who had offered him the job was unauthorized to do so; he informed Goodman of this development, and was assured that it would be "quite all right" for him to remain with the firm (R. 21; Tr. 192).

Almost immediately after this last incident, Ruiz was "put in charge" of warehouses 2 and 4 and given a pay increase of $5 a week (R. 20; Tr. 178-179, 205-206). His new job was accompanied with the understanding that it "was a stepping stone for further promotions if [he] remained with the firm or there were opportunities now for [him] to advance [himself] with the firm." (Tr. 205-206). About a week later, on November 8, Gelleri and Charles

Goodman asked Ruiz "how things were going" (R. 22; Tr. 314). Ruiz apologized that the warehouse was "in a very chaotic situation, or . . . in an upheaval," and that he was having difficulty getting "orientated" to his new job, but both Gelleri and Goodman assured him that he was doing a good job, and that his work so far indicated that he would be able to master his new position (R. 22; Tr. 314). Charles Goodman reassured Ruiz again on November 29 that his work was "quite satisfactory," and informed him that at the end of November he would receive a $5.00 a week pay raise, followed by two more such raises at the end of December and January, respectively (R. 22; Tr. 315). Goodman further promised that after his salary reached $125.00 per week, Ruiz would be reevaluated every six months, and would be given other raises if his work continued to warrant them (*ibid.*).

As shown *supra*, Ruiz signed a union authorization card on November 19, and was questioned about his union activities by Gelleri immediately after the Union demanded recognition on December 1. On December 3, he was questioned again, this time by Charles Goodman (Tr. 187-188). Goodman asked Ruiz if he were aware of the $5.00 premium pay that all employees received for working on Sundays, and if he were also aware that he was receiving this pay (Tr. 188). Ruiz responded affirmatively to both questions (*ibid.*). Goodman then asked if Ruiz realized that after January, he would be making $130.00 per week, including premium pay, and Ruiz again responded affirmatively (*ibid.*).

On December 8, Gelleri telephoned Ruiz at his work station, and told him to report back to the hardware warehouse after lunch (Tr. 188). Ruiz arrived at the hardware warehouse at approximately 1 o'clock, where he found Charles Goodman (*ibid.*). He inquired if Goodman wanted him to report to the hardware warehouse, and Goodman responded that he did (R. 20; Tr. 188-189). Ruiz then asked what he should do with the keys to warehouses 2 and 4 (*ibid.*). Goodman took them, and assured Ruiz that "everything else

would be taken care of" (R. 20; Tr. 189). Ruiz queried whether he would be assigned to the hardware warehouse "very long," but Goodman demurred, saying that "it was all taken care of, to report back to the hardware warehouse, and [he] was to work there." (*Ibid.*). On the way out of the hardware warehouse, Ruiz encountered Gelleri, who also told him, upon inquiry, to report to the hardware warehouse in the future (R. 20; Tr. 190). Ruiz asked if this were to be a "permanent change," but Gelleri only said "not to worry about it, that if he wanted [Ruiz] to know, he would let [him] know." (R. 20; Tr. 190).

The next afternoon, Gelleri came over to Ruiz at work and informed him that the Company was "letting [him] go" (R. 20; Tr. 190). Ruiz asked the reason, and Gelleri responded that the Company was "overstaffed in the hardware warehouse" (*ibid.*). When Ruiz expressed doubt about this assertion, Gelleri asserted that Ruiz was the last person hired in the hardware warehouse (R. 20; Tr. 190). Ruiz countered that he was not, but Gelleri responded that "that was all right, because [Ruiz] had at one time given them notice that [he] was leaving the firm" (R. 20; Tr. 190-191). Ruiz was thereupon discharged.

### D. The Constructive Discharge of Freeman Parker, Jr.

Parker, Jr. was one of the employees who signed an authorization card on November 19, and who was questioned by Gelleri about his union membership on December 1, the day the Union demanded recognition (*supra,* p. 4). President Goodman also spoke to Parker about his union activities, asking if he planned to get out of the Union; when Parker said he didn't know, Goodman warned ominously, "Well, I think you will." (*Ibid.*).

On December 1 or 2, Parker, Jr.'s father, who also worked for the Company, was called into the office by President Goodman (R. 45; Tr. 108-109). Goodman explained that he didn't want any more unions, that he already had one,

and that one was "just about it" (Tr. 110). He added that he had beat another union which had tried to organize the employees, and he would beat this one too (*ibid.*). He then told Parker, Sr. that his son had joined the Union, and asked him if he could get the boy's card back (R. 45; Tr. 110).[7] Parker, Sr. said that he thought he could do that, and promised at least to "give him hell" (Tr. 109). He complained that his son had given the Union a $50 initiation fee, and Goodman immediately offered to reimburse the boy if Parker, Sr. got his card back (*ibid.*).

Between this interview and mid-December, Parker, Jr. was subjected to continual pressure by his father to get out of the Union: Parker, Sr. testified that "I give him hell every day but it's to no avail, and I would have bet money I could do it, but . . . I couldn't do a doggoned thing with him. . . ." (R. 45; Tr. 109). And Parker, Jr. testified, "all that time during when the Union was going on, I would go home and argue about trying to get into the Union . . . . That's all I hear of. I hear of that before I hear hello or something. Every day I heard the same stuff. . . . I was being bothered by not getting out of the Union by my father. . . ." (R. 45; Tr. 163, 165, 170-171). Then, in mid-December, supervisor Paul Sant sought out Parker, Sr. and said. "Parker, I want to tell you something. Tell your son to resign." (R. 25; Tr. 133, 300). Parker, Sr. agreed to convey the message because, he testified, he was "getting tired of the headache" of being "harassed every day" by Mr. Goodman (Tr. 111). That evening, he told his son, "Little brother, Paul [Sant] told me to tell you to resign. . . . They don't want you down any more. Don't go back no more because he told me to tell you to resign." (R. 46; Tr. 141, 112). Parker, Jr.'s

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[7]Parker, Sr. was opposed to his son's union membership, as evidenced by his testimony at the hearing (R. 23; Tr. 137). On one occasion, he told President Goodman that he felt "bad" about his son's union membership because Goodman had been good to him, and that he would try to get "Sonny" to withdraw his card (R. 23; Tr. 285-286).

mother then announced that she would leave the house if he went back to work (Tr. 164).

Parker, Jr. did not go to work the next day, and Sant inquired of Parker, Sr. where he was (R. 46; Tr. 139). Parker, Sr. explained that his son was at home, and when Sant asked why, continued: "Well, didn't you tell me yesterday to tell him to resign?" (*Ibid.*). Sant responded, "Well, I didn't mean for him to quit." (R. 46; Tr. 139). Parker queried, "What do resign mean, if it doesn't mean quit?" (*Ibid.*). Sant said only, "That's what the bosses told me, Parker" (Tr. 112).

Shortly thereafter, President Goodman asked Parker, Sr. if he had attempted to get his son to come back and "sign a card" (Tr. 114). Parker, Sr. said he would try to get his son to come in, to which Goodman responded, "You either get him down there to sign or else." (Tr. 114). Later, Goodman again asked Parker, Sr. if his son were "coming down to sign," but Parker, Sr. explained that his son had left home and he was not sure where the boy could be located (Tr. 115).[8] Goodman warned, "If I lay you off a week you will find that boy." (Tr. 115).

Later, Goodman told Parker, Sr. that his son had a pay check coming, and should pick it up (Tr. 138). When Parker,

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[8]Parker, Sr. explained at the hearing that his son left home "after I was giving him hell every day", and that the following conversation ensued with his wife (Tr. 136):

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|---|---|
| Mr. Parker: | "Where is little brother?" |
| Mrs. Parker: | "He left." |
| Mr. Parker: | "Why?" |
| Mrs. Parker: | "Well, you're running that boy away from home." |
| Mr. Parker: | "Well, every time I get after him, after him about that Union. . . ." |
| Mrs. Parker: | "You're all the time getting after him about that Union and you gets him all upset. You see, he's not going to sign." |
| Mr. Parker: | "I'm getting tired of getting hell every day myself. I wish to God he never had come there in the first place." |

Jr. went to the Company for his check, he was summoned into Gelleri's office and asked if he had "brought anything with [him]" (R. 46; Tr. 138, 150). Parker, Jr. said he had not, and Gelleri asked if he would "sign something" (R. 46; Tr. 151, 153-154). Parker, Jr. "knew" that Gelleri was referring to a withdrawal of his authorization card, and responded that he would not sign anything (R. 46; Tr. 152-154). Goodman then handed him his last paycheck (*ibid.*).

### E. The Layoff of Carbby Lee Burwell

Carbby Lee Burwell began working for the Company in July, 1965 as a warehouseman (R. 29; Tr. 88). In September, 1965, he was entrusted with some additional, janitorial duties, and was given a pay raise of 25¢ an hour (R. 29; Tr. 88-89). Six weeks later, he was given still another raise of 15¢ an hour (R. 29; Tr. 89-90). Prior to December 1, the Company had never complained about the quality of his work, and on at least one occasion in October, Charles Goodman complimented him on his work, saying that he was "keeping the store something better than the other janitor." (R. 28; Tr. 94-95).

As shown *supra*, Burwell was one of the employees who signed union authorization cards, and whose card was shown to Gelleri on December 1 by the union representatives (*supra*, p. 3). After the union representatives left Gelleri's office that day, supervisor Levy came over to Burwell and said that he "was watching [Burwell] slow down, [that he] wasn't as fast as [he had been] before . . . that [he] should speed up a little more . . . [and that his] work was just unsatisfactory" (R. 29; Tr. 96). Levy then ordered Burwell to perform some additional duties, such as scrubbing the cigarette burns on the floor with steel wool, dusting out the medicine cabinets, unloading boxes, and dusting off the roof (indoor) of the credit department (R. 29; Tr. 96-97). And about a week later, Charles Goodman gave Burwell similar additional jobs to perform (*ibid.*).

On approximately December 26, Levy called Burwell into his office and told him that because business was slow he was being laid off, and that he should return after January 3 (R. 29; Tr. 97-98). Burwell objected that he didn't think business was that slow, but Levy merely said that he had told Burwell to come back after January 3 (*ibid.*).

As soon as Burwell returned on January 4, Levy said to him, "[Is] the floor dirty enough for [you]? . . . It could get a little dirtier." (Tr. 98). Approximately two weeks later, Levy approached Burwell, who was sweeping the main floor of the store, and told him to clean the restroom (R. 29; Tr. 99-100). Burwell complied, but shortly after he started to clean the room, Levy came in and "started to cussing" him about leaving trash on the main floor; he alleged that he knew Burwell had left it there, and told him not to leave trash there any more (R. 29; Tr. 100-101). He then told Burwell to "leave everything as it was and start cleaning the restroom" (*ibid.*). Burwell asked Levy not to curse at him, pointing out that he had never talked to Levy in that manner, and then denied that he was responsible for leaving the trash on the floor (R. 29; Tr. 100-101). Levy asked why Burwell did not quit (R. 29; Tr. 101). Burwell responded that Levy would have to exercise his authority to fire him or lay him off (*ibid.*).

### F. The Interrogation of Freeman Parker, Sr.

Finally, a few days before the hearing in this case, Gelleri requested that Parker, Sr. come to his office (R. 30; Tr. 120). On arrival, Parker was introduced by Gelleri to Mr. Levine and Mr. LaVine, Company's counsel in this case (R. 30; Tr. 120-121). Gelleri then left the office, and Levine asked Parker whether Goodman had said any "harsh words" to him (R. 30; Tr. 121-122). Parker told him of one incident, and Levine then asked if Parker had signed an authorization card (*ibid.*). "I signed a card in 1952 with the Union," Parker answered (R. 30; Tr. 121-122). Levine asked which union, and Parker responded, "Local 2559," which, Levine

explained to LaVine, was the "other union" (R. 30; Tr. 121-122).[9]

## II. THE BOARD'S CONCLUSIONS AND ORDER

On the basis of the foregoing facts, the Board, in agreement with the Trial Examiner, found that the Company violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activities, by promising employee Freeman Parker, Jr. monetary benefits if he would revoke his union authorization card, and by threatening employee Freeman Parker, Sr. with reprisals if he did not convince his son to revoke his authorization card. The Board further found, in agreement with the Trial Examiner, that the Company discharged employee Roger Ruiz, and laid off employee Carbby Lee Burwell, because of their union activities, in violation of Section 8(a)(3) and (1) of the Act. Differing with the Trial Examiner, the Board found that the Company's treatment of Freeman Parker, Jr. was motivated by Parker's union activities, and that his eventual departure from the Company as a result of this treatment constituted a constructive discharge in violation of Section 8(a)(3) and (1) of the Act. Finally, the Board concluded, at variance with the Trial Examiner, that the Company counsel's interrogation of employee Freeman Parker, Sr. regarding his union membership constituted a violation of Section 8(a)(1) of the Act.

The Board ordered the Company to cease and desist from the unfair labor practices found. As affirmative relief, the Board ordered the Company to offer Roger Ruiz and Freeman Parker, Jr. immediate and full reinstatement, to make Ruiz, Parker, Jr., and Burwell whole for any loss of earnings suffered as a result of the Company's discrimination against them, and to post appropriate notices. (R. 32-35, 48-49).

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[9]Local 2559, Lumber Handlers Union, which had represented some of the Company's employees since 1952 (R. 30; Tr. 107).

## ARGUMENT

### I.

### SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY INTERFERED WITH, RESTRAINED AND COERCED ITS EMPLOYEES IN VIOLATION OF SECTION 8(a)(1) OF THE ACT

As shown in the Statement, the Company, in response to the Union's successful organizational campaign, launched a counter-campaign designed to undermine the Union's majority status. Indeed, the very day the Union presented its demand for recognition, general manager Gelleri, after ascertaining the names of the employees who had signed cards, questioned both Parker, Jr. and Ruiz about their union membership, and asked each what kind of inducements the Union had offered. A few days later, Gelleri reminded employee Julia Myers of the benefits which the Company offered, and then asked if she had signed a card. Gelleri also questioned Joseph Pohl about his union membership. And both Gelleri and President Goodman asked Thomas Irving if he had signed a card, and reminded him of the benefits the Company offered its employees in an effort to persuade him to change his mind. Such interrogation about an employee's union membership, unaccompanied by any reassurances that the Company will not visit reprisals for union activity, obviously has a tendency to intimidate employees in the exercise of their Section 7 rights. This is especially so where, as here, there was no legitimate reason for the Company's questions, and the Company was openly trying to erode the support for the Union by persuading Irving to change his mind, and by coercing Parker, Jr. into withdrawing his authorization card (see *infra*). As the Fifth Circuit explained in *Martin Sprocket & Gear Co. v. N.L.R.B.*, 329 F.2d 417, 420 (C.A. 5):

> An employer may have a legitimate purpose of merely seeking information which makes it permissible as free speech under Section 8(c). However,

> [the Company] had no legitimate reason to ferret out its employees' affiliations, and while questioning these men it offered no assurance against reprisal. Such questions about their union sympathies and activities could well tend to influence the employees and were not permissible as free speech under Section 8(c) of the Act, as they were not the expression of a view, argument or opinion as there contemplated.

Accord: *N.L.R.B. v. Dan Howard Mfg. Co.*, 390 F.2d 304, 306-307 (C.A. 7); *N.L.R.B. v. Consolidated Rendering Co.*, 386 F.2d 699, 703 (C.A. 2); *N.L.R.B. v. Louisiana Mfg. Co.*, 374 F.2d 696, 700-701 (C.A. 8); *N.L.R.B. v. McCormick Concrete Co.*, 371 F.2d 149, 151 (C.A. 4).

For similar reasons, the Company's interrogation of Parker, Sr. about his union membership a few days before the hearing was also violative of Section 8(a)(1) of the Act. As the Court explained in *Joy Silk Mills v. N.L.R.B.*, 185 F.2d 732, 743 (C.A. D.C.), cert. denied, 341 U.S. 914:

> The Board has held that "an employer is privileged to interview employees for the purpose of discovering facts within the limits of the issues raised by a complaint, where the employer, or its counsel, does so for the purpose of preparing its case for trial and does not go beyond the necessities of such preparation to pry into matters of union membership . . . ." Apparently, this rule means that an employer may question his employees in preparation for a hearing but is restricted to questions relevant to the charges of unfair labor practice and of sufficient probative value to justify the risk of intimidation which interrogation as to union matters necessarily entails; and even such questions may not be asked where there is a purposeful intimidation of employees. Such a standard assumes that interrogation of employees concerning their union activities is of itself coercive, but that fairness to the employer requires that a limited amount of such questioning be permitted despite the possible restraint which may result.

> We think that the standard established by the Board, as just described, is a reasonable one, and aptly designed to carry out the purposes of the Act . . . . The fact that the fruits of the questioning are to be used in preparation for a hearing does not make the interrogation any less coercive . . . .

Accord: *N.L.R.B. v. Neuhoff Brothers Packers, Inc.*, 375 F.2d 372, 377-378 (C.A. 5); *Retail Clerks International Ass'n v. N.L.R.B.*, 373 F.2d 655, 657-658 (C.A. D.C.). And see cases cited *supra*, p. 14.

The Company also attempted by more direct means to get Parker, Jr. to revoke his union membership. First, Gelleri summoned Parker, Sr. into the office and told him that if he would get his son's card back, the Company would reimburse him for the initiation fee he paid to join the Union. Such a promise of benefit for withdrawal from the Union is clearly violative of the Act if made directly to the employee being solicited. *N.L.R.B. v. Luisi Truck Lines*, 384 F.2d 842, 845 (C.A. 9); *N.L.R.B. v. Parma Water Lifter Co.*, 211 F.2d 258, 262 (C.A. 9), cert. denied, 348 U.S. 829, and cases there cited. The fact that the promise in this case was communicated indirectly through Parker, Sr. is of no consequence, since the record shows that Parker, Sr. acted as the Company's agent in transmitting its threats and promises to Parker, Jr. See *N.L.R.B. v. State Center Warehouse & Cold Storage Co.*, 193 F.2d 156, 158 (C.A. 9); *N.L.R.B. v. Walter Kocher and Co.*, 211 F.2d 6 (C.A. 2). Compare, *N.L.R.B. v. Tex-Tan, Inc.*, 318 F.2d 472 (C.A. 5) (company's threat never communicated to the employee in question).

Later, after Parker, Jr. had resigned, Goodman told Parker, Sr. to get his son to come back and "sign a card," saying "you either get him down here to sign or else." When Parker, Sr. said he was not sure he could comply with Goodman's instructions because his son had left home, Goodman threatened, "If I lay you off a week you will find that boy" (Tr. 114-115). These efforts on Goodman's part to com-

pel Parker, Sr.'s assistance in achieving his son's withdrawal from the Union plainly constituted a violation of Section 8(a)(1) of the Act. *N.L.R.B. v. Collins & Aikman Corp.*, 338 F.2d 743, 746 (C.A. 5); *Bourne v. N.L.R.B.*, 332 F.2d 47, 48 (C.A. 2); *N.L.R.B. v. Longhorn Transfer Service, Inc.*, 346 F.2d 1003, 1005-1006 (C.A. 5).[10]

## II.

## SUBSTANTIAL EVIDENCE ON THE RECORD AS A WHOLE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT BY DISCHARGING EMPLOYEE RUIZ, BY CONSTRUCTIVELY DISCHARGING EMPLOYEE PARKER, JR., AND BY LAYING OFF EMPLOYEE BURWELL, BECAUSE OF THEIR UNION ACTIVITIES

### A. Introduction

In seeking to determine whether an employee was laid off or discharged for discriminatory reasons, it is necessary to look at all of the surrounding circumstances. Since there is rarely direct evidence of discriminatory motive, the trier of fact must infer from the evidence available whether the

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[10] Although the Company did not specifically state that it was referring to a revocation of Parker, Jr.'s authorization card, it is clear from the context that this is what was meant, and that it was so understood by all. The Company had been insistent from the day of the Union's demand that it wanted Parker, Jr. to withdraw his authorization; it had specifically told Parker, Sr. to obtain such a withdrawal; after Parker, Jr. left the Company and his home, his mother told Parker, Sr. that he had been harassing his son too much about the Union, and that he was "not going to sign" (Tr. 136). Only after Parker, Jr.'s withdrawal was not forthcoming did the Company suggest that he come in to get his pay check; when he complied, the Company asked if he had "brought anything with him" or if he would "sign something," which Parker, Jr. "knew" referred to a revocation of his authorization card. Parker, Jr. refused to sign, and was promptly given his pay check. It is reasonable to infer from these facts that the Company was not merely requesting Parker, Jr. to sign a formal resignation slip, as contended, but rather was demanding a revocation of his authorization card.

reason given by the Company is the real reason for the discharge or a pretext. As this Court stated in *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 470 (C.A. 9):

> Nor is the trier of fact—here the trial examiner—required to be any more naif than is the judge. If he finds the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that the motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference. . . .

Accord: *Aeronca Manufacturing Co. v. N.L.R.B.*, 385 F.2d 724, 727-728 (C.A. 9). Evidence that the Company was hostile to the Union, and was willing to break the law to defeat it, is obviously an important factor in determining the motivation behind the discharges or layoffs, especially when they occur right on the heels of the Union's achievement of majority status. See, *e.g.*, *Aeronca Manufacturing Co. v. N.L.R.B.*, *supra* at 728; *Perel v. N.L.R.B.*, 373 F.2d 736 (C.A. 4).

In this case, the Company was strongly opposed to the advent of the Union. When presented with valid authorization cards from a majority of its employees it first sought to delay, and then flatly refused, to bargain collectively. In the week following the Union's demand for recognition, it coercively interrogated all except one of the card signers, and unlawfully attempted to obtain the withdrawal of Parker, Jr.'s card. Employee Ruiz was discharged the following week; Parker, Jr. left approximately a week later, after continuous pressure from the Company and his father to withdraw from the Union; and Burwell was laid off for three days about two weeks after Parker, Jr. left. Coupling the Company's antiunion attitude with the unusual circumstances surrounding the exodus of these three employees, and the failure of the Company's explanations to withstand scrutiny, the Board was amply warranted in concluding that the Company's actions in regard to each of them were discriminatory, in violation of Section 8(a)(3) and (1) of the Act.

### B. Roger Ruiz

As shown above, Roger Ruiz had been employed with the Company since July, and was evidently a satisfactory employee. After his unsuccessful attempt in October to obtain another job because of the better advancement opportunities it offered, the Company had immediately sought to make his prospects at Goodman brighter; it gave him a pay increase and put him in charge of two of the warehouses; it told him that his new job was a "steppingstone to further promotions if he remained with the firm" (Tr. 205-206); it gave him another raise at the end of November; it promised him two more such raises at the end of December and January, and every six months thereafter if his work continued to be satisfactory; and it assured him on at least two occasions during November, the latter instance occurring only two days before the Union's demand for recognition, that his work was good and the Company was satisfied with him. It is evident from this background that the Company was eager to retain Ruiz and to prepare him for further responsibility with the Company—at least until it learned of his union adherence.

Thereafter, the Company's attitude towards him changed abruptly. He was immediately interrogated about his union membership, and reminded of the fact that by the end of January he would be receiving $130.00 per week ($20 more than he had earned when initially employed by the Company). A week later, he was suddenly and inexplicably reassigned to the hardware warehouse, his initial place of employment, and was ordered to relinquish the keys to the warehouses of which he had been in charge. He was given no reason for his reassignment, and was not told how long his reassignment would last. And the very next day he was discharged.

These factors in themselves furnish ample support for the Board's determination that Ruiz was discriminatorily discharged. But further support is furnished by the explanations which the Company offered for the discharge. Thus,

Ruiz was first told that the hardware warehouse was overstaffed, an assertion that Ruiz denied, and which seems implausible in any case since Ruiz had just been reassigned to work there the previous day. (Of course, if it was in fact overstaffed, the Company's reassignment of Ruiz can only be explained by a desire on its part to furnish an excuse to discharge him). Ruiz was next told that he was lowest in seniority in the hardware warehouse. But when Ruiz pointed out that this assertion was factually inaccurate, the Company came forward with its final reason[11] –that Ruiz had given the Company notice in October that he was leaving the firm. This explanation is plainly pretextuous, since the Company had assured Ruiz after this incident that it would be "quite all right" for him to remain with the Company, and had thereafter gone to great lengths to ensure his future commitment to the Company.

In sum, the circumstances surrounding Ruiz's discharge all point to the conclusion reached by the Board: that Ruiz was discharged because of his union activities.

### C. Freeman Parker, Jr.

The Company's efforts regarding Freeman Parker, Jr. were more subtle, but equally effective in ridding the Company of another union adherent. Having interrogated him regarding his union membership immediately after the Union's demand for recognition on December 1, and ominously

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[11] At the hearing, the Company advanced still other explanations, namely that Ruiz had been excessively tardy, and that he had failed to fill orders properly. However, although his time cards (RX 1) disclose that he was a few minutes late on several occasions, they also disclose that he was a few minutes early on other occasions. Furthermore, he was never reprimanded concerning this allegedly excessive tardiness (R. 21; Tr. 205). Regarding his failure to fill orders properly, the Company asserted that on one or more occasions merchandise was returned because of such failures; since there were two other salesmen who filled orders, such mistakes could also be attributable to them, and no showing was made that it was in fact Ruiz who was responsible. (R. 22; Tr. 311-313, 317-318).

warning him that he would eventually withdraw from the Union, President Goodman requested Parker, Jr.'s father to obtain his son's withdrawal from the Union, and even offered to reimburse Parker, Jr. for the initiation fee he had paid to join the Union. For the next two weeks, the record reveals that the Company exerted considerable pressure on Parker, Sr., who, in turn, made his son's life unbearable. Thus, Parker, Sr. said he was "harassed every day" and was "getting hell every day" from the Company (Tr. 111, 136). He then, admittedly, "[gave his son] hell every day," and Parker, Jr. said that "all that time during when the Union was going on, [he] would go home and argue about trying to get into the Union . . . . [He] was being bothered by not getting out of the Union by [his] father" (R. 45; Tr. 109; 163, 165, 170-171). Finally, the Company instructed Parker, Sr. to get his son to "resign" (R. 25; Tr. 133, 300), and Parker, Sr., who was "getting tired of the headache", complied: Parker, Jr. not only quit, but left home because of the intolerable pressure to which he had been subjected.

There can be little question, in view of these facts, that Parker, Jr.'s eventual resignation was directly attributable to to the pressure exerted by the Company through Parker, Sr. For although it appears that Parker, Sr. was opposed to his son's union membership, there is no evidence that he was actively opposed until after the Company instructed him to obtain his son's withdrawal, or that he exerted any pressure on his son to withdraw until that time. On the contrary, Parker, Sr.'s testimony clearly establishes that he harassed his son because he himself was being subjected to intolerable pressure by the Company to get his son out of the Union. Nor does the Company's statement after Parker, Jr.'s eventual departure—that it had not meant for him to quit in spite of its specific instructions to Parker, Sr. to get his son to "resign"—relieve it of the responsibility for his action. For significantly, the Company did not, on learning that Parker, Jr. had quit, instruct his father that he should, or could, return to his job while still a union member. Instead,

it subjected Parker, Sr. to further pressure to get Parker, Jr. to withdraw from the Union, threatening to lay Parker, Sr. off unless he found the boy. And, when Parker, Jr. finally returned to pick up his final pay check, he was personally asked to sign a revocation of his authorization card (see *supra,* n. 10). Only after the Company ascertained that Parker, Jr. would not sign such a revocation did it give him his final pay check. Therefore, it is evident that the Company was fully responsible for Parker, Jr.'s departure. Moreover, even if it did not intend him to quit but only to "resign" from the Union, having achieved the former result, it ratified it by not permitting Parker, Jr.'s return unless he signed a revocation of his union authorization. Under these circumstances, the Board was amply warranted in concluding that the Company constructively discharged Parker, Jr. by subjecting him to such intolerable pressure to withdraw from the Union that he eventually quit, in violation of Section 8(a)(3) and (1) of the Act. *N.L.R.B. v. Tennessee Packers, Inc., Frosty Morn Div.*, 339 F.2d 203, 204-205 (C.A. 6); *N.L.R.B. v. Ra-Rich Mfg. Corp.*, 276 F.2d 451, 453-454 (C.A. 2); *N.L.R.B. v. Saxe-Glassman Shoe Corp.*, 201 F.2d 238, 243 (C.A. 1).[12]

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[12]The fact that the Board differed from the Trial Examiner on this issue does not detract from the substantiality of the evidence supporting its decision. As the Court recently stated in *Oil, Chemical and Atomic Workers International Union, Local 4-243 v. N.L.R.B.*, 362 F.2d 943, 945-946 (C.A. D.C.):

> . . . For the most part, the problem is one of drawing inferences from evidentiary facts. We may assume for present purposes that there was substantial evidence to support the findings of the Examiner, even though these were based on circumstantial evidence. The Board is, however, the agency entrusted by Congress with the responsibility of making findings in cases arising under the statute, and it is not precluded from reaching a result contrary to that of the Examiner when there is substantial evidence in support of each result . . . .
>
> The difference in approach relates to matters where the presumptively broader gauge and experience of members of the Board have a meaningful role. The Board members may or

### D. Carbby Lee Burwell

As shown in the Statement, Carbby Lee Burwell was, until the advent of the Union, considered a satisfactory employee with no history of complaints or reprimands. Indeed, he had received two raises since his initial employment in July, had been entrusted with additional responsibility in September, and had been complimented on his work on at least one occasion thereafter. However, the very day that the Union demanded recognition, supervisor Levy complained about the quality of Burwell's work for the first time, and ordered him to do some menial tasks, such as scrubbing the cigarette burns on the floor with steel wool, dusting out medicine cabinets, and dusting off the indoor roof of the credit department. A week later, Charles Goodman assigned Burwell to similar additional jobs. Two weeks thereafter, Burwell was suddenly laid off for three days.

The treatment accorded Burwell after the Company learned that he had signed a union card supports the Board's inference that he was actually laid off for his union membership, rather than for legitimate reasons. Further supporting this inference is the treatment he received after he returned. Thus, the day he returned, Levy sarcastically asked him if the floor was dirty enough, and remarked that it could get "a little dirtier" (Tr. 98). Two weeks later, he was "cuss[ed]" for leaving trash on the floor, a dereliction for which he was not responsible. And then Levy pointedly asked Burwell why he did not quit. In view of the Company's obvious antiunion sentiments, its proclivity to commit unlawful acts in an attempt to undermine the Union's majority status, and its marked change in attitude towards

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> may not be sounder in their inferences and findings than the Examiner, but it is they who have been given the statutory responsibility . . . .

Accord: *N.L.R.B. v. Colletti Color Prints, Inc.*, 387 F.2d 298, 302-303 (C.A. 2); *N.L.R.B. v. Tom Johnson, Inc.*, 378 F.2d 342, 344 (C.A. 9).

Burwell beginning immediately after it learned of his union membership, the Board was amply warranted in concluding that his layoff was in fact motivated by his union activities. Of course, even if, as the Company contended before the Board, there was some slackening in the work load at this particular time, that factor will not excuse the Company's layoff of Burwell unless it was the sole motivating cause of his layoff, unaccompanied by any discriminatory motive. *Aeronca Mfg. Co. v. N.L.R.B., supra* at 727; *N.L.R.B. v. Security Plating Co., Inc.,* 356 F.2d 725, 728 (C.A. 9); *N.L.R.B. v. Isis Plumbing & Heating Co.,* 322 F.2d 913, 922 (C.A. 9). The record supports the Board's conclusion here that Burwell's union activities played a substantial role in the Company's decision to lay him off and, therefore, that his layoff was violative of Section 8(a)(3) and (1) of the Act. See, *N.L.R.B. v. Monroe Auto Equipment Co.,* 392 F.2d 559 (C.A. 5); *N.L.R.B. v. Witbeck,* 382 F.2d 574, 576 (C.A. 6); *Post Houses, Inc. v. N.L.R.B.,* 384 F.2d 463 (C.A. 3); *N.L.R.B. v. Crew Builders Supply Co.,* 377 F.2d 992 (C.A. 6).

### E. Summary

The overall picture presented on this record is that the Company was unwilling to deal with the Union, and attempted by all possible means to undermine its majority status.[13] Of the six employees who signed union authorization cards, none escaped without some form of coercion by the Company. Five were interrogated about their union membership within a week after the Union demanded recognition. The four who had first signed cards, on November 19, were dealt with especially harshly: Ruiz was discharged within a week; Freeman Parker, Jr. was harassed in

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[13] As noted above (p. 3, n. 5), the complaint in this case originally contained Section 8(a)(5) refusal-to-bargain allegations, which were withdrawn early in the hearing when the parties entered into a settlement agreement on that aspect of the case (R. 16; Tr. 48-54).

various ways until he finally quit; Burwell was suddenly treated with unusual severity and then laid off for three days; and Irving was questioned and subjected to some persuasion concerning withdrawal. In view of the Company's overall attitude towards the Union, its outright refusal to meet and bargain with the Union for over six months, and its willingness on many occasions to contravene the prohibitions of the Statute, the Board was amply warranted in concluding that the Company's treatment of the three employees in question was violative of Section 8(a)(3) and (1) of the Act.

## CONCLUSION

For the reasons stated hereinabove, it is submitted that the Board's order should be enforced in full.

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DOMINICK L. MANOLI,
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MARCEL MALLET-PREVOST,
*Assistant General Counsel,*

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ABIGAIL COOLEY BASKIR,
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*National Labor Relations Board.*

June 1968

## CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST
*Assistant General Counsel*
*National Labor Relations Board*

## APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

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### RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

### UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

* * *

PREVENTION OF UNFAIR LABOR PRACTICES

* * *

Sec. 10 (e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

## APPENDIX B

This Appendix is prepared pursuant to Rule 18(f) of the Rules of this Court. References are to pages of the original transcript of record ("Tr.").

### GENERAL COUNSEL'S EXHIBITS

| NO. | IDENTIFIED | OFFERED | RECEIVED IN EVIDENCE | REJECTED |
|---|---|---|---|---|
| 1 (a) thru 1 (L) | 6 | 5 | 7 | |
| 2 | 15 | 20 | 20 | |
| 3 | 16 | 20 | 20 | |
| 4 | 16 | 20 | 92 | |
| 5 | 16 | 20 | 20 | |
| 6 | 16 | 20 | 20 | |
| 7 | 17 | 20 | 20 | |
| 8A | 48 | 49 | 49 | |
| 8B | 49 | 49 | 49 | |
| 9 | 58 | – | 59 | |
| 10 | 174 | 176 | – | 176 |
| 11 | 290 | | | |

### RESPONDENT'S EXHIBIT

| NO. | IDENTIFIED | OFFERED | RECEIVED IN EVIDENCE | REJECTED |
|---|---|---|---|---|
| 1 | 232 | 265 | 266 | |